IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No 5[illegible]

[illegible]SSIE LEE HALL, Petitioner,

versus

[illegible]ED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

IVAN A. McINNIS,
[illegible]
[illegible]

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IN THE

Supreme Court of the United States

——————— Term, 1960

ROSSIE LEE HALL, - - - - - - *Petitioner,*

v.

UNITED STATES OF AMERICA, - - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Rossie Lee Hall, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on June 22, 1960. On August 24, 1960 the Court of Appeals granted leave to appellant to file a petition for rehearing within 20 days from August 24th. Petition for rehearing was duly filed within this time, and was denied by the Court of Appeals on September 27, 1960.

OPINION BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is printed in Appendix A hereto, *infra*, page 11.

QUESTION PRESENTED.

Whether the facts in affidavit for search warrant in the instant case show probable cause for issuance of warrant.

STATUTE INVOLVED.

Fourth Amendment to the United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment to the United States Constitution:

> "No person shall be held to answer * * *; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; * * *."

STATEMENT.

Petitioner was charged by indictment with possession of an unregistered still; making mash; and interfering with an Alcohol and Tobacco Tax Investigator in his service of a search warrant. The District Court for the Southern District of Indiana, New Albany Divsion, overruled petitioner's motion to quash the search warrant and for return of propery, and to suppress evidence, and over objection permitted to use of evidence and information obtained by virtue of this warrant. The case was tried before a jury, and petitioner was found guilty on all three counts, upon which the court entered judgment and sentenced petitioner. The Court of Appeals sustained the District Court. The following section amplifies the question involved herein.

REASONS FOR GRANTING THIS WRIT.

"This (second clause of the Fourth Amendment) prevents the issue of warrants on loose, vague or doubtful bases of fact. * * * the amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement less there be impairment of the rights for the protection of which it was adopted." Go-Bart Importing Company, *et al.* v. United States, 282 U. S. 344, 357, 51 S. Ct. 153, 158, 75 L. Ed. 374.

In this cause the Court of Appeals concluded that an affidavit which reads as follows:

> "On January 10, 1959, at 7:30 P.M. Investigators Guernsey, Kafoglis, Stocking and Rea followed a 1957 Ford Sedan away from the Hall premises and noted that the car was from Jefferson County, Kentucky and was occupied by three colored individuals and searched it and found therein 400 pounds of sugar. The owner and driver, Mary Peoples stated that she had taken the sugar to the Hall premises to leave it there but Hall told her to take it away as his place was too hot. The investigators then set up surveillance near the Hall premises for 2 hours and all during the time noted the odors of fermenting mash coming directly from the Hall house and building."

was sufficient evidence of probable cause to justify the issuance of a search warrant and that the District Court acted correctly and without error in refusing to quash the search warrant or to order the return of the property and permitting the use of the evidence and information obtained by the search.

In support of this opinion the Court of Appeals cites Jones v. United States, 362 U. S. 257 (1960), and Draper v. United States, 358 U. S. 307 (1959).

Appellant respectfully submits to the Court that the above decisions are not a blanket endorsement of hearsay as probable cause on which to base a search warrant, but require, before hearsay is accepted, the following (none of which are present in the instant case):

1. That the officer had been told by one who claimed to have bought narcotics there that the accused was selling narcotics in the apartment to be searched.
2. That the officer's informant had previously given accurate information.
3. That the informant's story was corroborated by other sources of information.
4. That the accused was known by the police to be a user of narcotics.

The instant case is not a narcotics case, but an alcohol tax case, but aplying the principles of the Jones and Draper cases, both of which were narcotic cases, to the instant case, *NONE OF THE FOUR* qualifying points which the Court relied on in accepting hearsay in the Jones and Draper cases are present in the instant case.

In illustration of the point appellant is trying to make may we quote the following from the Jones case (page 708 of 4 L. Ed. 2d):

> "Thus we may assume that Didone had the day before been told by one who claimed to have bought narcotics there, that petitioner was *SELLING NARCOTICS IN THE APARTMENT*: HAD THAT BEEN ALL, IT MIGHT NOT HAVE BEEN ENOUGH; BUT DIDONE SWORE TO A BASIS FOR ACCEPTING THE INFORMANT'S STORY. The informant had previously given accurate information. History was corroborated by other sources of information. And petitioner was known by the

police to be a user of narcotics." Italics are appellant's.)

Appellant respectfully submits that the affidavit in this instant case does not allege even any hearsay that appellant was doing anything in violation of the law. Whereas in the Jones and Draper cases the hearsay allegation is in exact words that; (In the Jones case—that defendant was "selling narcotics in the apartment"; In the Draper case—that defendant was in possession of narcotics).

Petitioner's position is that the courts below acted upon an erroneous view, in conflict with the opinion of this Court in Henry v. United States (1959), —— U. S. ——, 80 S. Ct. ——, 4 L. Ed. 2d 134. At page 138 of the Henry case this Court said:

> "* * * common rumor or report, suspicion or even 'strong reason to suspect' was not adequate to support a warrant for arrest."

Petitioner can find no United States Supreme Court decision holding that the words "probable cause" mean anything different when applied to the basis (affidavit) for the issuance of a search warrant, than when applied to basis for a lawful arrest.

The Government in supporting this search warrant is confined to the statement of facts purporting to allege probable cause *in the affidavit itself*, and cannot expand this affidavit by later arguments.

United States v. Goodwin (1924), 1 F. 2d 36;
United States v. Casino, 286 F. 976 (1923);
United States v. Nichols (1950), 89 Fed. Supp. 953.

There is nothing in the affidavit herein defining "too hot", nor can the Government now attempt to supply its own definition. There is nothing in the affidavit to indicate that "sugar is an ingredient commonly used in the manufacture of distilled spirits", as the Government now tries to contend in its argument. There is nothing in the affidavit to show whether Clyde Rea was an inexperienced agent, or what his record with the Government was.

> "The smell of alcohol did not further the right of search or arrest. The alcohol would have smelled with or without stamps."
>
> United States v. Kind (1937), 87 F. 2d 315 at page 316.

> "The court or commissioner cannot, from the statement of the one fact that the investigator noticed about the premises an odor of fermenting mash, infer such a case."
>
> United States v. Goodwin (1924), 1 F. 2d 36 at page 37;
>
> U. S. v. Nichols, 89 F. Supp. 953 (1950).

> "To put it another way the affidavit here must stand scrutiny as to whether it contains *facts* which constituted probable cause to conclude that a violation of federal *tax* laws had occurred. If it fails to meet that test, it is fatally defective and must be struck down under the proscription of the Fourth Amendment."
>
> United States v. Office No. 508 Ricou-Brewster Bldg. (1954), 119 Fed. Supp. 24, at page 27.

"It is not enough that on the hearing other grounds may appear, even though not upon evidence extracted by the search itself. The showing for the issue must be enough to stand alone and must be proved upon the hearing if challenged. It will not do to abandon the 'reasonable cause' first asserted and support the search upon a new charge. In this respect, affidavits are like pleadings. * * * Hence if those allegations on their face be inadequate, the warrant can by no possibility be legal."

United States v. Casino (1923), 286 F. 976 at page 977 (Judge Learned Hand).

As far as the record in the instant case shows, the meaning of the statement attributed to "Mary Peoples" is unexplained and undefined. The alleged rumor is practically meaningless. On this record petitioner submits that there was far from enough evidence against him to justify issuance of a warrant. So far as this record shows petitioner had not even been suspected of criminal activity prior to this time.

Petitioner does not contend that hearsay alone renders an affidavit insufficient, nor that evidence required to establish guilt is necessary, but petitioner does take the position that an affidavit to establish probable cause must state *facts* upon which affiant's belief that there is cause to search is based, and that mere common rumor or report, suspicion or even strong reason to suspect is NOT ENOUGH, and that the "odors of fermenting mash" are not such facts.

CONCLUSION.

The ruling in the instant case by the Court of Appeal's 7th Circuit contravenes the principle laid down by the United States Supreme Court in the Henry case as quoted above.

For these reasons petitioner respectfully prays that this petition for Certiorari be granted, and the holding of the lower courts reversed.

EVAN A. McLINN,
402 Elsby Building,
New Albany, Indiana,
Attorney for Petitioner-Defendant.

APPENDIX A.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12919 SEPTEMBER TERM, 1959 — APRIL SESSION, 1960.

ROSSIE LEE HALL,
Defendant-Appellant.

v.

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

Appeal from the United States District Court for the Southern District of Indiana.

June 22, 1960

Before HASTINGS, *Chief Judge*, and DUFFY and SCHNACKENBERG, *Circuit Judges*.

DUFFY, *Circuit Judge*. This appeal involves the validity of a search warrant which, in turn, depends upon the sufficiency of the affidavit upon which the search warrant was based.

Defendant was found guilty of three counts in an indictment. In Count I, defendant was charged with having in his possession and custody and under his control, an unregistered still and apparatus, in violation of §§5174 and 5601, Internal Revenue Code of 1954. In Count II he was charged with unlawfully making mash fit for distillation on premises other than a distillery duly authorized by law in violation of §§5216(a) and 5608, Internal Revenue Code of 1954; and, in Count III, defendant was charged with resisting and interfering with agent Clyde T. Rea while

Rea was engaged in the performance of his official duties as a special investigator of the Alcohol & Tobacco Tax Unit, United States Treasury Department, Internal Revenue Service, in violation of 18 U. S. C. 111.

Defendant moved to quash the search warrant and for a return of the property, and to suppress the evidence. The District Court refused to quash the search warrant, and permitted use of evidence and information obtained by reason of the search made pursuant to the search warrant. The District Court also denied defendant's motions for a judgment of acquittal.

Special Investigator Clyde T. Rea appeared before a United States Court Commissioner seeking a search warrant for the premises occupied by the defendant. He filed an affidavit which read in part:

> "On January 10, 1959, at 7:30 p.m., Investigators Guernsey, Kafoglis, Stocking and Rea followed a 1957 Ford Sedan, away from the Hall premises and noted that the car was from Jefferson County, Kentucky and was occupied by three colored individuals and searched it and found therein 400 pounds of sugar. The owner and driver, Mary Peoples stated that she had taken the sugar to the Hall premises to leave it there but Hall told her to take it away as his place was too hot. The investigators then set up surveillance near the Hall premises for 2 hours and all during the time noted the odors of fermenting mash coming directly from the Hall house and buildings."

The affidavit also described the exact location of the Rossie Lee Hall farm, and referred to a white, two-story frame house located thereon. Affiant stated he had good reason to believe there was concealed on said property, distilled spirits upon which the tax had not been paid, fermenting mash fit for distillation and an illicit distillery.

Defendant urges that the search and seizure herein violated his rights under the Fourth Amendment, United States Constitution, and that the use of the evidence and information obtained by virtue of the search, violated his rights under the Fifth Amendment.

The Fourth Amendment provides that warrants shall issue only upon probable cause, supported by an oath particularly describing the place to be searched and the things to be seized. It is unreasonable searches and seizures that are prohibited by the Fourth Amendment. *United States* v. *Rabinowitz*, 339 U. S. 56, 60. Of course, if evidence obtained by an unreasonable search and seizure is used against a defendant upon a trial, such use would be a violation of the self-incrimination clause of the Fifth Amendment. *Marron* v. *United States*, 275 U. S. 192, 194.

On this appeal, defendant urges that from the face of the affidavit, it appears that the search warrant was not issued upon probable cause in that the affidavit did not allege facts on which a determination of the existence of probable cause could be legally made.

It must be conceded the affidavit was inartistically drawn. It would seem that a treasury agent of even a limited amount of experience should have been able to draw an affidavit in such form that litigation of this kind would be avoided. Nevertheless, upon a consideration of the entire affidavit, we reach the conclusion that there was probable cause for believing the existence of the grounds on which the search warrant was issued.

Rea's affidavit stated that Mary Peoples, the owner and driver of the 1957 Ford which drove away from defendant's farm, informed him she had taken the 400 pounds of sugar to the Hall premises to leave it, but defendant told her to take it away as his place was too hot. Defendant argues this was merely hearsay, and not facts upon which a search warrant could be issued.

In a recent case the Supreme Court has sustained the validity of a search where the affidavit contained information which would be considered hearsay upon a trial. *Jones* v. *United States*, 362 U. S. 257 (1960). In that case, the Court held that hearsay alone does not render the affidavit insufficient as long as there is a substantial basis for crediting the hearsay.

In the *Jones* case the Court said, 362 U. S. at page 270:

"We rejected the contention that an officer may act without a warrant only when his basis for acting would be competent evidence upon a trial to prove defendant's guilt. Quoting from *Brinegar* v. *United States*, 338 U. S. 160, 172, we said that such a contention 'goes much too far in confusing and disregarding the difference between what is required to prove guilt in a criminal case and what is required to show probable cause for arrest or search * * *.'" The Court further stated, at page 170: "What we have ruled in the case of an officer who acts without a warrant, governs our decision here. If an officer may act upon probable cause without a warrant when the only incriminating evidence in his possession is hearsay, it would be incongruous to hold that such evidence presented in an affidavit is insufficient basis for a warrant."

The case which the Court was referring to in *Jones* is *Draper* v. *United States*, 358 U. S. 307 (1959). There, the arrest was made without a warrant and the arresting officer acted upon information which would be considered hearsay evidence if offered upon a trial. In *Draper*, the Court again quoted from *Brinegar* as follows: "In dealing with probable cause, * * * as the very name implies, we deal with probabilities. These are not technical; they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

In *Draper*, the Court held that probable cause exists when the facts or circumstances within the arresting officers' knowledge and of which they had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

Much of the Rea affidavit was based upon personal observation and not upon hearsay. He was one of the four agents who stopped the Peoples' automobile and found therein 400 pounds of sugar. He was one of the investigators who set up the surveillance near the Hall premises, and the affidavit states that the odors of fermenting mash came directly from the Hall house and buildings. The agent knew that under Title 26, 5171 no person was permitted to use a still, boiler or other vessel for the purposes of distilling in any dwelling house or other shed or building connected with such a dwelling house.

We conclude there was sufficient evidence of probable cause to justify the issuance of the search warrant, and the District Court acted correctly and without error in refusing to quash the search warrant or to order the return of the property, and permitting the use of the evidence and information obtained by the search.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

LE COPY

No. 506

JAMES R. BROWNING, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1960

ROSSIE LEE HALE, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 506

ROSSIE LEE HALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at 279 F. 2d 389.

JURISDICTION

The judgment of the Court of Appeals was entered on June 22, 1960. A petition for rehearing was denied on September 27, 1960. The petition for a writ of certiorari was filed on October 25, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the search warrant under which an illegal distillery was discovered was based upon a sufficient affidavit.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of Indiana on three counts charging (1) possession of an unregistered still, (2) unlawfully making mash, and (3) resisting a federal officer engaged in the service of a search warrant by pointing a gun and threatening to shoot the officer. Petitioner was sentenced to imprisonment for a total of four years, one year on counts 1 and 2, and two years on count 3, the sentences to run consecutively. He was also assessed a total of $1,000 in fines and penalties.

The sole question raised is the sufficiency of the affidavit to support the search warrant (R. 21-23) which resulted in the discovery of a distillery in petitioner's house. The affidavit, executed by an investigator of the Alcohol and Tobacco Tax Unit of the Internal Revenue Service, stated that the affiant had reason to believe that on petitioner's farm there was concealed untaxpaid distilled spirits, mash, and an illicit distillery. The farm was described as follows:

> —go to Harrison-Floyd County Line on State Highway 64, Indiana, then proceed about 1.6 miles to a gravel road on left, then turn left on this road and go about 2 10 of a mile to the first lane on right and then go in lane to a white two story frame house, with barns and outbuildings—

The facts tending to establish probable cause were set forth as follows:

> On January 10, 1959, at 7:30 PM, Investigators Guernsey, Kafoglis, Stocking and Rea followed a 1957 Ford Sedan, away from the Hall premises and noted that the car was from Jefferson County, Kentucky and was occupied by three colored individuals and searched it and found therein 400 pounds of sugar. The owner and driver, Mary Peoples stated that she had taken the sugar to the Hall premises to leave it there but Hall told her to take it away as his place was too hot. The investigators then set up surveillance near the Hall premises for 2 hours and all during the time noted the odors of fermenting mash coming directly from the Hall house and buildings.

The sufficiency of the affidavit was upheld on a motion to suppress before trial, on objections to evidence during trial, and on appeal.

ARGUMENT

As the court below held, the affidavit, read as a whole, was sufficient to show probable cause under the standards laid down by this Court in *Jones* v. *United States*, 362 U.S. 257, and *Draper* v. *United States*, 358 U.S. 307. The affidavit was not based solely on the statement of the driver of the automobile containing the sugar that petitioner had told her to take it away because his place was "too hot". The suspicion that such information tended to arouse (that petitioner's premises were being used for an illegal purpose) was confirmed by the personal ob-

servation of the affiant. The affidavit shows that the agent himself detected the odors of fermenting mash coming directly from petitioner's house and buildings. Any distillery on the premises described in the affidavit had to be illegal in view of 26 U.S.C. 5178(a)(1)(B), which provides that no plant for the production of distilled spirits "shall be located in any dwelling house, in any shed, yard, or inclosure connected with any dwelling house." In all, the facts set forth in the affidavit show good reason to believe that petitioner's house was being used to run an illegal distillery.[1]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

NOVEMBER 1960.

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[1] Even if the warrant were vulnerable to attack, the officer serving it was nevertheless engaged in "the performance of his official duties" within the meaning of 18 U.S.C. 111. *See Amaya* v. *United States*, 247 F. 2d 947, 950 (C.A. 9), certiorari denied, 355 U.S. 916; *Arwood* v. *United States*, 134 F. 2d 1007, 1011 (C.A. 6), certiorari denied, 319 U.S. 776. Petitioner's conviction on the third count laid under 18 U.S.C. 111 is therefore not affected by the legality of the warrant.

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